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No.

In the Supreme Court of the United States

October Term, 1982

POST-NEWSWEEK STATIONS, FLORIDA, INC., COM-
MUNITY TELEVISION FOUNDATION OF SOUTH
FLORIDA, INC., and THE MIAMI HERALD
PUBLISHING COMPANY,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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April 4, 1983

QUESTION PRESENTED FOR REVIEW

Is the First Amendment Abridged by the Application of Court Rules Requiring Arbitrary Exclusion of Electronic Media From a Federal Criminal Trial of Great Public Interest in Which the Defendant Requested That Electronic Media Access Be Allowed and the Government Asserted No Interest in Exclusion?

PARTIES TO THE PROCEEDINGS BELOW

The following is a list of all parties appearing in the proceedings before the United States Court of Appeals for the Eleventh Circuit:

Appellants

Post-Newsweek Stations, Inc.

Wometco Enterprises, Inc.

Community Television Foundation of South Florida, Inc.

The Miami Herald Publishing Company

The Radio-Television News Directors Association

The National Association of Broadcasters

Appellee

The United States of America

Appellee in Support of the Appellants

The Honorable Alcee L. Hastings

III

PARENTS, SUBSIDIARIES AND AFFILIATES OF THE PETITIONERS

Petitioner, Post-Newsweek Stations, Florida, Inc., is a wholly-owned subsidiary of Post-Newsweek Stations, Inc., a subsidiary of The Washington Post Company. The petitioner owns and operates television station WPLG-TV, Channel 10, an affiliate of the American Broadcasting Companies, Inc. in Miami, Florida.

Petitioner, The Miami Herald Publishing Company, is an unincorporated operating division of Knight-Ridder Newspapers, Inc.

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OPINION IN THE COURT BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit appears at F.2d, 8 Med.L. Rptr. (BNA) 2617 (11th Cir. 1983) and is reproduced as Appendix A. The oral ruling of the United States District Court for the Southern District of Florida rendered November 30, 1982, was transcribed and is reported at 8 Med.L.Rptr. (BNA) 2559 (S.D. Fla. 1982) and is reproduced as Appendix B.

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on January 4, 1983. This petition was filed within ninety days of that date. The Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. §1254(1) (1976).¹

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

This case involves the first amendment of the United States Constitution, which is reproduced in Appendix C, Rule 53 of the Federal Rules of Criminal Procedure, which is reproduced in Appendix D, Rule 20 of the General Rules of the United States District Court for the Southern District of Florida, which is reproduced in Appendix E, Canon 3A(7) of the Code of Judicial Conduct for United States Judges, which is reproduced in Appendix F, and Resolution G of the United States Judicial Conference, which is reproduced in Appendix G.

1. Although the trial in which the question presented arose is over and no relief can be granted to the petitioners which would cure the error below, the question is not moot because it is capable of repetition yet evading review. See *Globe Newspaper Co. v. Superior Court for the County of Suffolk*, _____ U.S. _____, 102 S.Ct. 2613, 73 L.Ed. 2d 248 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979); *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911).

STATEMENT OF THE CASE

In December, 1981, a federal grand jury in the Southern District of Florida returned a four-count indictment against the Honorable Alcee L. Hastings, a United States District Judge for the Southern District of Florida, and William A. Borders, Jr., a prominent Washington, D.C. attorney. The indictment alleged Hastings and Borders solicited and accepted a bribe from an undercover FBI agent who was posing as a criminal defendant in a case that had been before Judge Hastings. The bribe allegedly was given in return for Hastings' agreement to reduce the defendant's prison sentence and to revoke an order that defendant forfeit certain property. *United States v. Hastings*, 681 F.2d 706, 707 (11th Cir. 1982).

Judge Hastings, who had direct experience with televised trials as a state trial judge in Florida and who was on record, prior to his indictment, as favoring camera access to judicial proceedings, filed a motion with the trial court October 27, 1982, to allow the telecasting, broadcasting, recording, and still photography of his trial.

The motion and accompanying memorandum asserted that electronic media² coverage of his trial would be essential to the preservation of his right to receive a fair and public trial.

The petitioners, Post-Newsweek Stations, Florida, Inc., Community Television Foundation of South Florida, Inc., the owner and operator of the public television station in Miami, Florida, and The Miami Herald Publishing Com-

2. Unless the context otherwise requires, "electronic media" shall be used as a generic term which encompasses all television, film and video type cameras, still photography cameras, tape recording devices, and radio broadcasting equipment.

pany, as well as other media organizations, became aware of Judge Hastings' motion and filed a motion to intervene with an application to allow telecasting, broadcasting, recording, and photographing of the trial, including gavel-to-gavel uninterrupted telecasting of the entire trial. Within the application, petitioners agreed that if they were granted access they would adhere to the Standards of Conduct and Technology Governing Electronic Media and Still Photographic Coverage of Judicial Proceedings which are a part of Canon 3A(7) of the Florida Code of Judicial Conduct and which is reproduced in Appendix H. That rule was the subject of this Court's scrutiny in *Chandler v. Florida*, 449 U.S. 560 (1981).

The application was supported by the affidavits of Edward D. Cowart, former chief judge of the Eleventh Judicial Circuit of the State of Florida, and William L. Richey, former Chief of the Organized Crime and Public Corruption Division of the Dade County State Attorney's Office. Both Judge Cowart and Mr. Richey have extensive experience with televised trials including cases which are more notorious, more highly publicized and more controversial in the Miami community than the Hastings' trial.

The affidavits stated that electronic media coverage of trials causes no disruption of the proceedings. Edward D. Cowart, former chief judge of the Eleventh Judicial Circuit of the State of Florida, stated that "the coverage of highly publicized trials by television in the courtroom actually makes the highly publicized trial more manageable and takes considerable pressure from the trial participants, including the trial judge." William Richey, one of Dade County's most experienced prosecutors testified in his affidavit that cameras did not to him appear to have any influence whatsoever on witnesses or jurors. Finally, the affidavit of the president of Community Television Foun-

dation of South Florida, Inc. indicated that this trial would be telecast in its entirety, from gavel-to-gavel, if the petitioners' application were granted.

Petitioners also filed in support of their application a stipulation executed by counsel for Judge Hastings indicating that Hastings knowingly and intelligently waived all objections to electronic media coverage of his trial and a joinder in that stipulation personally executed by Judge Hastings.

Judge Hastings' joinder stated "he is familiar with courtroom access by electronic media under the Florida rules and he believes that access under those rules is entirely consistent with the rights of all parties and the public interest in the administration of justice."

The Honorable Edward Thaxter Gignoux, sitting by designation, conducted a hearing on Judge Hastings' motion and on petitioners' motion and application November 30, 1982. At that hearing, Judge Gignoux granted petitioners' motion to intervene. Petitioners proffered videotape evidence, testimonial evidence,³ and oral argument in support of their application. Judge Gignoux stated further evidence was unnecessary because he was prepared to assume that all factual representations by counsel for the petitioners, made during argument, in affidavits, and in memoranda were true.

Judge Gignoux stated during the course of oral argument:

The Court is prepared to accept for the purposes of the present motion that the news media applicants are

3. Petitioners' videotape evidence included actual Florida trials (Intervenor's Exhibits A-E), including various judicial proceedings presided over by Judge Hastings himself (Intervenor's Exhibit C), to demonstrate that unobtrusive electronic media coverage of trials is in fact possible.

responsible representatives of the television and radio broadcasting industry and that the representations which are made in their supporting papers and memorandum will be complied with and that the electronic television (sic) and broadcasting of a trial, if permitted, would be unobtrusive and not interfere with the conduct of the trial, all as set forth in your memorandum and proffer.

After hearing argument of counsel for Judge Hastings and for the petitioners, Judge Gignoux asked the government for its position. Counsel for the government responded not by asserting any interest in excluding electronic media, but rather counsel argued that Rule 53 of the Federal Rules of Criminal Procedure requires arbitrary exclusion of electronic media from every criminal trial regardless of the factual circumstances. In their earlier written opposition to Judge Hastings' motion, government counsel urged the court not to consider whether electronic media coverage would in fact cause the disruption of the trial in any manner, stating, "The government takes no position on these practical considerations because they are irrelevant in the present context. Rule 53 is essentially a legislative decision that broadcasting of federal trials should not be permitted."

Applying Rule 53 of the Federal Rules of Criminal Procedure, Rule 20 of the General Rules of the United States District Court for the Southern District of Florida, Canon 3A(7) of the Code of Judicial Conduct for United States Judges, and Resolution G of the Judicial Conference of the United States, the trial judge denied petitioners' application for access without articulating any findings which supported the order. He determined that he was bound by the rules to exclude the electronic media irrespective of the interests in the case before him. Judge Gignoux held:

This Court is faced with not simply one but four unyielding obstacles to the granting of these motions . . . Just as the moving parties have presented no authority for their contention that this Court has the power to simply ignore Rule 53 of the Federal Rules of Criminal Procedure, they have presented no authority for the suggestion that this Court can disregard the explicit prohibition of radio or television broadcasting of judicial proceedings, not only by Local Rule 20 of this Court, but more importantly by amended Resolution G of the Judicial Conference of the United States and by Canon 3A(7) of the Code of Judicial Conduct for United States Judges, a code of conduct which is binding on me as a federal district judge.

The Court rejected arguments that the first amendment at a minimum precludes exclusion of electronic media absent an overriding interest articulated in findings. Judge Gignoux concluded: "The First Amendment right of the news media are (sic) fully satisfied by their ability to be present and to report what may transpire at a criminal trial." In accordance with these determinations, he entered a one-line, hand-written order which read:

Hearing had. Application *denied*.

/s/ Edward T. Gignoux,
U.S.D.J., by designation.

Petitioners filed a notice of appeal December 1, 1982, and an emergency motion to expedite the appeal the following day. The motion was granted and a briefing schedule concluding December 15, 1982 was set. On January 4, 1982, the Eleventh Circuit issued an opinion affirming the district court's judgment. The Eleventh Circuit held the absolute prohibitions on electronic media access imposed

by Rule 53, Rule 20 and Canon 3A(7) are "time, place, and manner" restrictions on the first amendment right of access which are justified by two "institutional interests": (1) an interest in preserving order and decorum and (2) an interest in procedures which tend to insure a fair trial. The appellate court found these interests applicable even though they were not present in this case at all. The court further held that the absence of any sixth amendment fair trial concern was irrelevant.

Petitioners filed motions for stay pending review by the United States Supreme Court in both the district court and the court of appeals. Both motions were denied.

The trial of Alcee L. Hastings commenced on January 13, 1983, and concluded eight days later when the jury returned a verdict of not guilty. No electronic media were present during any portion of the trial.

REASONS FOR GRANTING THE WRIT

This case raises an important question of federal law that has not been, but should be, answered by this Court. The court below answered the question in a manner which conflicts with principles enunciated by the Court.

1. The Court Of Appeals Has Decided An Important Question Of Federal Law Which Has Not Been, But Should Be Settled By This Court.

The primary reason that this Court should accept jurisdiction is that the question presented is of importance to the public interest in directly observing the working of the federal criminal justice system and to the administration of justice in every federal court in the United States.

A technological revolution has occurred since the rules banning electronic media from all federal trials were enacted in the late 1930s and mid-1940s. The reasons which once justified the rules no longer exist. It is now possible, as has been demonstrated in some forty states which allow some type of electronic media coverage of state judicial proceedings,⁴ to televise and photograph trials in an unobtrusive fashion which neither lessens courtroom decorum nor infringes upon the fair trial rights of parties. The states have proven through extensive experimentation that electronic media coverage of trials now may be accomplished in a way which is consistent with all constitutional principles. The Court recognized that proposition in *Chandler v. Florida*, 449 U.S. 560 (1981), upholding the Florida rule which allows electronic media coverage of trials.

Chandler having established that electronic media coverage of trials is constitutionally possible, this Court must now consider whether absolute legislative bans of such coverage are constitutionally permissible. *Chandler* did not address this issue. See 449 U.S. at 589 (White, J., concurring). The issue is important because large segments of the public are not receiving adequate information about the federal criminal justice system generally and about individual trials. The courts are flooded with litigation—both civil and criminal—yet public understanding of the federal judicial system necessarily is minimal because the vast majority of the public has no opportunity to observe the system directly.

Our constitutional system is predicated on an assumption that citizens will be as informed as possible about

4. See Radio-Television News Directors Association, *News Media Coverage of Judicial Proceedings with Cameras and Microphones: A Survey of the States* (February 4, 1983).

all branches of government, including the judiciary. Greater public awareness of the courts could lead to a better understanding of their workings and to a more informed public debate on substantive law issues and judicial administration. It also could result in an increased appreciation of the complex, important and time-consuming work performed by all trial participants.

Television, as a visual medium, is particularly suited to fulfilling the need of the American public for greater information about the federal court system. It conveys information through pictures and sounds of actual events as they happen. Through these pictures and voices of the participants, the atmosphere—the tones, inflections, and subtleties—of the event are conveyed to the viewer. Television provides the most accurate and effective tool to report that has ever been devised and the public today relies on that medium more than any other for complete, honest, and objective information about virtually all news events. The electronic media literally provide citizens with a window through which they may see, understand, and participate in an increasingly complex world. The process is unique to these times. No parallel exists in history.

Still photographs of news events illustrate printed reports and provide an important source of information to the public. No subjective narrative description of what has transpired in a courtroom can provide the instantaneous, accurate information contained in even a single photograph.

This case squarely presents the important issue of whether a legislative prohibition of electronic media access to federal criminal trials is constitutionally permissible—the Court already having established that electronic media access to criminal trials is constitutionally possible.

2. The Court Of Appeals Has Decided A Federal Question In A Way Which Is In Conflict With Applicable Decisions Of This Court.

This Court first held a right of access to criminal trials exists under the first amendment of the United States Constitution in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). Although the Court reached no majority opinion in that case, seven of the justices agreed that the right of access does exist—and none of the various opinions attempted to limit the right to any particular sectors of the public or media. It is a constitutional right which may be asserted by any person and any medium.⁵ See generally, Comment, *The "Right of Information Triangle": A First Amendment Basis for Televising Judicial Proceedings*, 4 U. Haw. L. Rev. 85 (1982).

Chief Justice Burger's plurality opinion in *Richmond Newspapers* concluded that the right of access may not be denied "[a]bsent an overriding interest articulated in findings." 448 U.S. at 581. The statute interpreted in *Richmond Newspapers* did give the trial judge discretion to exclude from the trial any "persons whose presence would impair the conduct of a fair trial." Va. Code §19.2-266 (Supp. 1980). In holding that the trial court's exercise of this discretion required individualized findings to satisfy the first amendment, the Supreme Court recognized a constitutionally-mandated role for the trial judge in all decisions

5. Petitioners in the instant case sought only to bring unobtrusive electronic media equipment into a courtroom for the purpose of reporting a trial. In essence, they sought to do only what every member of the public may do—attend a public trial in an unobtrusive fashion to observe, consider, and report to others what transpires. The fact that members of the public use their ears, eyes and minds to do this function while members of the electronic press use cameras and recorders is constitutionally irrelevant.

which restrict the right of access to trials. In essence, the Court held that the first amendment dictates a case-by-case analysis by the trial judge to weigh the particular interests in exclusion against the first amendment interest in access. Chief Justice Burger did not view this requirement as limited only to decisions involving total closure of trials. The presiding judge also must articulate findings which would justify any time, place or manner restrictions on access. Justice Burger stated:

We have no occasions here to define the circumstances in which all or parts of a criminal trial may be closed to the public, cf., e.g. 6 J. Wigmore, Evidence §1835 (J. Chadbourn rev. 1976), but our holding today does not mean that the First Amendment rights of the public and representative of the public are absolute. Just as a government may impose reasonable time, place, and manner restrictions upon the use of its streets in the interest of such objectives as the free flow of traffic, see e.g., *Cox v. New Hampshire*, 372 U.S. 569, 85 L.Ed. 1049, 61 S. Ct. 752, 133 ALR 1369 (1941), so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations on access to a trial. "[T]he question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge . . . the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places." 448 U.S. at 581, n.18.

The case-by-case method of analysis again was held necessary by this Court in *Globe Newspaper Co. v. Superior Court for the County of Suffolk*, U.S., 102 S.Ct. 2613, 73 L.Ed. 2d 248 (1982), when the Court was faced with a Massachusetts statute requiring closure

of all rape and other sexual assault trials during testimony of victims who are minors. Massachusetts asserted its interest in protecting rape victims and in encouraging such victims to testify was a sufficiently "overriding" interest to justify closure of every case involving this type of testimony.

The Court held that the Massachusetts legislature could not usurp the power of the trial judge to determine whether closure is required under the facts of any given case. The Court agreed that the interest asserted in Massachusetts in safeguarding the physical and psychological well-being of minors was compelling but held "it does not justify a *mandatory*-closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest. A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor." U.S. at, 73 L.Ed. 2d at 258 (emphasis in original). The Court then noted that Chief Justice Burger's plurality opinion in *Richmond Newspapers* had "suggested that individualized determinations are *always* required before the right of access may be denied." U.S., n.20, 73 L.Ed. 2d at 258, n.20 (emphasis in original).

These two recent decisions recognize that absolute legislative bans are inappropriate for the resolution of access questions concerning the judicial system. Although a state legislature or the Judicial Conference of the United States can, and should, promulgate guidelines that trial courts should apply in making their findings of fact, these legislative bodies may not mandate absolute denial of access because they inherently are unable to weigh the relevant facts of a particular case. Even this Court, when acting in its legislative capacity promulgating rules of procedure for lower federal courts, cannot determine whether the

facts of a particular case would justify a limitation on the right of access. In every case in which the right of access is in any way limited, either by full closure of the trial, by partial closure of the trial, or by a limitation on the time, place, or manner of access, the trial judge presiding over that case must articulate in findings the interest overriding the right of access. This is the fundamental holding of *Richmond Newspapers* and *Globe Newspaper Co.*

Rules of procedure that impose arbitrary and absolute bans on access violate the first amendment.

That the rules at issue here call for only exclusion of electronic media rather than complete closure of trials does not justify application of per se rules in a case such as this one in which the rules serve no legitimate governmental purpose. The rules significantly diminish communicative activity yet are not supported by a "sufficient" governmental interest to warrant exclusion of electronic media from every case.

The petitioners before the Court sought permission from the trial judge to provide uninterrupted gavel-to-gavel television coverage of the trial of Alcee L. Hastings because of its historical uniqueness and social importance. In this Republic's long history there have been only three other instances of criminal proceedings against active federal judges and this was the first trial of a federal judge for crimes allegedly committed while on the bench. See *United States v. Hastings*, 681 F.2d 706, 709 n.7 (11th Cir. 1982). The fact that Judge Hastings is the first black federal judge in Florida and he publicly claimed his prosecution was racially motivated also called for close public scrutiny of the trial. Gavel-to-gavel coverage of this trial would have provided the public with unique information which could not be provided by any other medium and

which could not reach the public any other way than through electronic media reports. Members of the public were able to assert their right of access individually by coming to the courthouse.⁶ But no reason existed to limit the benefits of access to those privileged few who could afford the luxury of attending a trial.

As serious as the failure to recognize the need for case-by-case adjudications of access claims, was the judgment of both the Eleventh Circuit and the district court that a court need not look beyond naked legislative declarations to determine whether a restriction impinging upon the first amendment actually serves any governmental interest. This decision is directly contrary to this Court's holding in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), that:

Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake . . . Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified. 435 U.S. at 843-44.

6. Many people who came to the courthouse, however, were not allowed in because of the size of the courtroom. Lines formed early each morning outside the courtroom and only the earliest arrivals were allowed into the trial. The line remained outside the courtroom for the duration of the trial. If any observer left during the trial, the next person in line was allowed in. Of course, whenever a trial is of historic importance or social significance, many members of the public are denied the opportunity to attend the trial because of the physical limitations of courtrooms. In many cases, an amphitheatre would be insufficient to accommodate all those who wished to attend. The presence of a television camera in the courtroom would provide those excluded from a courtroom because of space limitations, as well as those simply unable to make the journey to the courtroom, an opportunity to see the trial.

The prohibitions of electronic media coverage of criminal trials also clearly eliminated an effective means of communicating information about the trial to the public, and such restrictions may not be justified because alternative means of obtaining the information, such as attending the trial or reading about it in the newspapers exists. In cases such as *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1979) and *Virginia Pharmacy Board v. Virginia Citizens Consumer Counsel*, 425 U.S. 748 (1977), this Court rejected arguments that government could vindicate bans on real estate "For Sale" signs and pharmaceutical price advertising because there were alternative methods of obtaining the information conveyed by the signs through less effective media. Similarly, the bans on electronic media coverage of trials may not be sustained because other media may carry reports about the trial. No medium can provide as full and accurate a report as the electronic media. Petitioners emphasize that Community Television Foundation of South Florida, Inc., the public television station in Miami, would have provided uninterrupted gavel-to-gavel coverage if it had been granted access.⁷ Ob-

7. The petitioners pointed out to Judge Gignoux that the Community Television Foundation of South Florida, Inc., WPBT-TV, Channel 2, has engaged in substantial coverage of judicial proceedings, including trials, under Florida's camera-in-the-courtroom program and Revised Canon 3A(7). Such coverage has included the taping of four trials in their entirety; *State v. Zamora*, *State v. Hems*, *State v. Alvarado* and *State v. Reid*. WPBT-TV broadcast (i) 27 hours of the *Zamora* trial, as well as the 2-1/2 hour sentence hearing; (ii) about 42 hours of the *Hems* trial; (iii) a 3-1/2 edited version of the *Alvarado* trial; (iv) and a 75 hour trial broadcast of the *Reid* trial in its entirety. According to the Nielsen television market research survey between 75,000 and 125,000 people in the Miami area alone watched the *Zamora* trial, and the *Hems*' audience varied between 30,000 and 60,000. WPBT-TV was highly interested in covering this trial because it believed the public has a right to know how the judicial system handles the trial of a sitting federal judge for alleged corrupt practices.

vously, no written news account could match the thoroughness of such an account.⁸

The *Globe Newspaper Co.* decision itself stressed that the structural role of the first amendment in this society is not merely to protect discussion of governmental affairs but "to ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one." U.S. at, 73 L.Ed. 2d at 256. When electronic media are denied access to courtrooms it is clear that many members of the public are denied both qualitative and quantitative information which prevents them from making informed decisions or participating in meaningful discussion. The substantial impact of the rules prohibiting electronic media access to criminal trials is undeniable.

No countervailing societal interest in excluding electronic media from *every* criminal trial exists. This became clear after this Court held in *Chandler v. Florida*, 449 U.S. 560 (1981), that the access rights of the electronic media need not fall to the fair trial rights of criminal defendants in every case.

The facts of the instant case presented absolutely no justification for excluding the electronic media or any other media, let alone any compelling or even significant governmental interest in exclusion. The defendant, a sitting federal judge who, as a former Florida judge, was fully aware of any influence electronic media can have on trials, had knowingly and intelligently waived all rights he may have had to object to electronic media coverage

8. Electronic media also provides a more effective means of communication because it allows viewers to observe directly the demeanor of witnesses and other trial participants. Appellate judges frequently have deferred to their trial court brethren on factual issues because of just this point. See, e.g., *Townsend v. Sain*, 372 U.S. 293, 322 (1963); *Morris v. Oliver*, 645 F.2d 327, 331 (5th Cir. 1981); see also, *Louis v. Blackburn*, 630 F.2d 1105, 1109-10 (5th Cir. 1980).

of his trial.⁹ In fact, he demanded that such access be allowed and asserted that his fair trial rights in fact depended on such access being granted. The concerns for protecting the defendant emphasized in such cases as *Richmond Newspapers* and *Gannett* therefore simply do not exist.

Protection of governmental witnesses from publicity also was not a problem in this case. Counsel for the United States in fact argued to the trial court that "we favor, encourage, desire full, fair and accurate reporting of all proceedings in this case and we're certain that any media representative who wishes to be present will be present and can be present and they are free to report everything that they see and they are free to get access to the transcripts of the trial and thus the information itself, albeit not in the form they desire, is fully available to the press."

The interest of the judiciary in preserving the decorum and dignity of a federal criminal trial was not present in this case. Judge Gignoux eliminated that interest from this case by assuming for purposes of his ruling that the "electronic televisi[ng] and broadcasting of a trial, if permitted, would be unobtrusive and not interfere with the conduct of the trial." Additionally, no empirical evidence ever has shown that the mere presence of modern electronic media lessens the dignity of a courtroom anymore than the dignity of proceedings at the Vatican or the swearing in of judges, governors or presidents. Indeed,

9. Even the most fundamental rights can be waived. *Miranda v. Arizona*, 389 U.S. 436 (1966) (setting forth the "knowing and intelligent" waiver standard for deciding whether a defendant has given up his Fifth Amendment right to remain silent and his Sixth Amendment right to assistance of counsel); *United States v. Brown*, 569 F.2d 286 (5th Cir. 1978) (waiver of representation of counsel). Unlike cases dealing with fundamental, inviolate rights where waiver has been upheld, this case presents waiver of a purportedly procedural rule.

the rules allow cameras to be present in the court for such court proceedings as naturalization proceedings and other special events and these exemptions could not be allowed if there were any lessening of dignity of the court. The Florida experience with cameras has proven that the decorum of the court is in no way harmed by the electronic media. To the contrary, in highly publicized trials access by cameras actually eases the burden on the trial judge.

The rules may be held unconstitutional as applied to the facts of this case, but petitioners also submit that the rules are facially unconstitutional. Any governmental rule is void on its face if it "does not aim specifically at evils within the allowable area of control, but . . . sweeps within its ambit other activities that constitute an exercise" of protected rights. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

The overbreadth doctrine frequently has been applied to strike down statutes and ordinances which constituted complete bans on one particular means of communication. For example, in *Thornhill* a statute banning all picketing including peaceful picketing protected by the first amendment was held void on its face. In such cases where the statute on its face is not susceptible to a narrowing interpretation and the mere existence of the statute or rule is likely to chill the exercise of protected rights, courts have not waited to adjudicate each application of the rule as it arises, but instead have short-circuited the usual adjudicatory process by sending it back to the legislative body for redrafting. See generally Note, *The First Amendment Overbreadth Doctrine*, 83 Harv.L.Rev. 844 (1970).

Application of the overbreadth doctrine is particularly appropriate in this case. Petitioners are entitled to be free from the patently unconstitutional rules of procedure

and judicial conduct which prohibit all electronic media access to trials. The rules now stand as blanket prohibitions. In every subsequent case, petitioners or other news organizations will be required to bear the heavy burden of litigating the constitutionality of the application of those heavy-handed restrictions unless the rules are rewritten so they may be applied in a way which will not violate the first amendment. The Supreme Court of Florida and many other state courts already have demonstrated that it is possible to draft rules that will satisfactorily discriminate between harmless and pernicious types of access. In *re* *Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764 (Fla. 1979). The American Bar Association also has promulgated a model canon which expressly permits electronic media coverage of judicial proceedings.¹⁰ Should the Court accept jurisdiction and hold the existing rules unconstitutional, it then would be able, in its legislative rule-making capacity, to promulgate rules which would accommodate all constitutional interests.¹¹

10. On August 11, 1982, the ABA, largely in response to this Court's *Chandler* decision and changes made in state codes, amended Canon 3A(7) of the ABA Code of Judicial Conduct. The new canon permits electronic media coverage "consistent with the right of the parties to a fair trial and subject to express conditions, limitations, and guidelines which allow such coverage in a manner that will be unobtrusive, will not otherwise interfere with the administration of justice." The United States Conference of Chief Justices had recommended this change of the ABA Code, by a 44-1 vote, four years earlier. Resolution I. Television, Radio, Photographic Coverage of Judicial Proceedings, Annual Meeting in Burlington, Vermont, August 2, 1982.

11. One legislative process, petitioners note, already is underway in the United States Judicial Conference. The petitioners along with 25 other news organizations filed a petition with the Conference March 8, 1983, proposing amendments to Canon 3A(7) of the Code of Judicial Conduct for United States Judges and Rule 53 of the Federal Rules of Criminal Procedure which would allow electronic media coverage of federal criminal trials pursuant to guidelines promulgated by the Conference. This Court has supervisory authority over federal courts and considerable flexibility in directing procedures to accommodate electronic media access.

CONCLUSION

This petition for certiorari should be granted and, upon review, the decisions of the court of appeals and the district court should be reversed.

Dated: Miami, Florida
April 4, 1983

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this petition for writ of certiorari was served April 4, 1983, in accordance with Rule 28.1 of the Rules of the Supreme Court of the United States by depositing three true and correct copies in a United States post office or mailbox, with first-class postage prepaid, addressed to:

The Solicitor General
Department of Justice
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/s/ TALBOT D'ALEMBERTE
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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-6137

Non-Argument Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALCEE L. HASTINGS,
Defendant,

POST-NEWSWEEK STATIONS, INC., ET AL.,
Intervenor-Appellants.

Appeal from the United States District Court for the
Southern District of Florida

(January 4, 1983)

Before RONEY, VANCE and ANDERSON, Circuit Judges.

ANDERSON, Circuit Judge:

This expedited appeal presents the question whether federal rules which prohibit televising, broadcasting, recording, and photographing proceedings in federal criminal trials violate the First Amendment¹ or the Sixth Amend-

1. "Congress shall make no law . . . abridging the freedom of speech, or of the press." U. S. Const. amend. I.

ment.² In an order denying appellants' application to use electronic audio-visual recording devices during the upcoming trial, the district court cited four rules and authorities, including Rule 53 of the Federal Rules of Criminal Procedure³ (referred to as Rule 53) and Rule 20 of the General Rules of the United States District Court for the Southern District of Florida (referred to as Local Rule 20).⁴ We affirm the district court's order, as we hold that

2. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U. S. Const. amend. VI. It is argued that the Sixth Amendment entitles the criminal defendant herein to "a trial which is as public as the limits of technology permit." Brief for Amicus Curiae, Alcee L. Hastings, at 2.

3. Fed.R.Crim.P. 53 provides that "taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court." Congress authorized the Supreme Court to develop the Federal Rules of Criminal Procedure. 18 U.S.C. § 3771.

4. Local Rule 20 provides:

Other than required by authorized personnel in the discharge of official duties, all forms of equipment or means of photographing, tape-recording, broadcasting or televising within the environs of any place of holding court in the District, including courtrooms, chambers, adjacent rooms, hallways, doorways, stairways, elevators, or offices of supporting personnel whether the Court is in session or at recess, is prohibited; provided that photography in connection with naturalization hearings or other special proceedings, as approved by a Judge of this Court, will be permitted.

Local Rule 20 is promulgated pursuant to 28 U.S.C. § 2071 (authorizing the federal courts to "prescribe rules for the conduct of their business").

The district court cited two other authorities, Canon 3A(7) of the Code of Judicial Conduct for United States Judges and Resolution G of the Judicial Conference of the United States. In our judgment, the district court was bound by Rule 53 and Local Rule 20. Hence, we do not need to consider whether Canon 3A(7) and Resolution G violate the First Amendment. Canon 3A(7) provides that:

A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions except that a judge may authorize:

(Continued on following page)

Rule 53⁵ and Local Rule 20 violate neither the First Amendment nor the Sixth Amendment.

This issue first came before the trial court when the defendant, Alcee L. Hastings, moved the trial court to permit his trial to be televised, primarily relying on his Sixth Amendment right to a public trial.⁶ Shortly thereafter, appellants, representing the interests of numerous news organizations, filed a motion to intervene. In this

Footnote continued—

(a) the use of electronic or photographic means for the presentation of evidence, or for the perpetuation of a record; and

(b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings.

Resolution G states:

RESOLVED, that the Judicial Conference of the United States condemns the taking of photographs in the courtroom or its environs in connection with any judicial proceedings by radio, television, or other means, and considers such practices to be inconsistent with fair judicial procedure and that they ought not be permitted in any federal court. A Judge may, however, permit the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings.

5. Appellants argue that Rule 53 does not, by its terms, ban television cameras in the courtroom. Appellants' Brief at 42. In our view, the time for serious consideration of this interpretation has long since passed. See *Estes v. Texas*, 381 U.S. 532, 581-82 (1965). In any event, we need not reach the question of the precise meaning of Rule 53 because the district court applied Rule 53 in conjunction with Local Rule 20. Since Local Rule 20 clearly prohibits television cameras in the courtroom, we cannot avoid reaching the constitutional issue. Moreover, appellants seek permission for photographing and radio broadcasting, two activities which Rule 53 clearly proscribes.

6. Since 1979 Hastings has been a federal judge for the United States District Court for the Southern District of Florida. On December 29, 1981, he was indicted for conspiracy and obstruction of justice. The indictment accused him of accepting a bribe from an undercover agent posing as a criminal defendant. Judge Hastings voluntarily removed himself from his duties while his trial is pending. He favors televising of his trial so that his reputation can be restored.

motion, appellants, citing their First Amendment rights, applied to the trial court for an order permitting them to use electronic audio-visual equipment during the trial. After holding a hearing on the issue, the district court denied both motions on November 30, 1982. Trial was set to begin on January 10, 1983. Appellants filed a motion in this court for expedited appeal. The motion was granted, and this appeal followed.⁷ Although defendant Hastings has not joined this appeal, he has filed an amicus brief.

I. FIRST AMENDMENT

Appellants suggest that recent Supreme Court opinions indicate that the First Amendment should be extended to give the news media the right to televise, photograph, record, and broadcast federal criminal trials. We disagree with appellants' approach. Appellants' approach reflects a tortured reading of these Supreme Court opinions. None of those decisions intimate that the Supreme Court would find First Amendment rights abridged by the exclusion of television cameras and other electronic recording devices from the courtroom. See *Globe Newspaper Co. v. Superior Court*, U.S., 73 L.Ed.2d 248 (1982) (invalidated on First Amendment grounds a state statute which totally excluded the press and the general public from the courtroom in trials for certain sex offenses during the testimony of victims under the age of 18); *Chandler v. Florida*, 449 U.S. 560 (1981) (state's provision for television coverage of a criminal trial for public broadcast is constitutional); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (state trial court's order that closed the murder trial to the public and the press violated the First Amendment).

7. This court has jurisdiction to review the order at this time. See *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

Instead, these recent Supreme Court rulings stand for two propositions, neither of which is dispositive or even genuinely at issue here. First, television coverage of a criminal trial is not inherently unconstitutional. In particular, television coverage does not violate every defendant's due process rights. *Chandler v. Florida*, 449 U.S. at 574-81. But just because television coverage is not constitutionally prohibited does not mean that television coverage is constitutionally mandated.

Second, the press has a right of access to observe criminal trials, just as members of the public have the right to attend criminal trials. *Globe Newspaper Co. v. Superior Court*, 73 L.Ed.2d at 255-57; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 579-80. To conclude from these cases, as appellants do, that the right of access extends to the right to televise, record, and broadcast trials, misconceives the meaning of the right of access at stake in those cases. The right of access therein was the right to attend. In the upcoming trial here, journalists will be able to attend, listen, and report on the proceedings as they always have. No part of the trial has been closed from public scrutiny.

With regard to the right of access, appellants overlook the significance of another recent Supreme Court opinion, *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). That case concerned the Watergate tapes, which had been admitted into evidence in the trial of Nixon's former advisers. At trial, the district court supplied earphones to jurors, journalists, and members of the public to enable them to listen to the tapes. The court also released transcripts prepared by the Special Prosecutor which "were widely reprinted in the press." 435 U.S. at 594. After the trial had begun, Warner Communications asked the district court for permission to copy,

broadcast, and sell the tapes admitted in evidence. The district court denied this request. The Supreme Court, in upholding the district court's decision, rejected Warner Communications' assertion of a First Amendment right to copy and publish the tapes. 435 U.S. at 608-09. Justice Powell, writing for a majority of the Court, reasoned that:

The First Amendment generally grants the press no right to information about a trial superior to that of the general public. "Once beyond the confines of the courthouse, a news-gathering agency may publicize, within wide limits, what its representatives have heard and seen in the courtroom. But the line is drawn at the courthouse door; and within, a reporter's constitutional rights are no greater than those of any other member of the public."

435 U.S. at 609 (quoting *Estes v. Texas*, 381 U.S. 532, 589 (1965) (Harlan, J., concurring)). The Court explicitly rejected the broadcaster's claim that the right of access includes "the right to copy and publish . . . exhibits and materials displayed in open court." 435 U.S. at 609. See also *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 426-27 (5th Cir. 1981) (the press has no First Amendment right of physical access to audiotapes which recorded conversations between defendants and FBI agents and which were introduced into evidence).⁸

In *Warner Communications, Inc.* the Supreme Court rejected a First Amendment claim of right to copy and publish particular exhibits which had been admitted into evidence. In the instant case, appellants assert a First Amendment right to record and broadcast the entire trial.

8. In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. *Id.* at 1209.

Appellants' claim more nearly approximates the claim rejected in *Warner Communications, Inc.* than the claims which were sustained in *Globe Newspaper Co. v. Superior Court*, *supra*, and *Richmond Newspapers, Inc. v. Virginia*, *supra*.

On the other hand, this case can be distinguished factually from *Nixon v. Warner Communications, Inc.* and *Belo Broadcasting Corp. v. Clark* in two ways. First, the rules at issue here are absolute rules which prohibit televising, recording, photographing and broadcasting federal criminal trials, whereas the rules challenged in *Warner Communications* and *Belo Broadcasting* resulted from fact-sensitive determinations made by the trial judge on a case by case basis. Second, in the instant case, defendant Hastings has not only requested television coverage, but he has also knowingly and intelligently waived any objection he might have had. There was no such request or waiver in either *Warner Communications* or *Belo Broadcasting*.

In our judgment, neither distinction undermines the precedential value for this case of *Warner Communications* and *Belo Broadcasting*. We address first the distinction between an absolute per se rule and a case-by-case rule. In *Globe Newspaper Co. v. Superior Court*, U.S., 73 L.Ed.2d 248 (1982), the Supreme Court made it clear that an absolute per se rule which excludes the public and the press from a criminal trial is prohibited by the First Amendment. However, the rule struck down in *Globe Newspaper Co.* was significantly different from the rules at issue here. In *Globe Newspaper Co.*, the state statute provided that the courtroom be sealed off from public scrutiny whenever minor victims of sex offenses testified at the sex offender's trial. As a result, the alleged victim's testimony, which is likely to be the most critical evidence presented at such a trial, was obscured

from the view of the press and the public. By contrast, the rules here do not foreclose public scrutiny of the trial or any segment thereof.

In evaluating the state statute in *Globe Newspaper Co.*, the Supreme Court said that denial of "the right of access in order to inhibit the disclosure of sensitive information" must be "necessitated by a compelling governmental interest" and "narrowly tailored to serve that interest." *Id.* at 257. Significantly, the mandatory statute in *Globe* was deemed to violate the "narrowly tailored" test: "In short, § 16A cannot be viewed as a narrowly tailored means of accommodating the State's asserted interest." *Id.* at 258. However, the Supreme Court expressly noted that "limitations on the right of access that resemble 'time, place, and manner' restrictions on protected speech would not be subject to such strict scrutiny." *Id.* at 257, n.17. This was in contrast to the strict scrutiny which was applied to the *Globe* restriction which totally excluded the public and the press from certain parts of the trial.

The federal rules in the case before us resemble "time, place, and manner" restrictions. Rule 53 and Local Rule 20 do not absolutely bar the public and the press from any portion of a criminal trial; rather, they merely impose a restriction on the *manner* of the media's news gathering activities. The press is free to attend the entire trial, and to report whatever they observe. Thus, we conclude that strict scrutiny does not apply in the instant case, and that the *per se* rules here might well survive the lesser level of scrutiny which is applicable, even though the mandatory rule in *Globe Newspaper Co.* could not survive strict scrutiny.

Before defining the appropriate level of scrutiny applicable in this case and applying that scrutiny to the instant

facts, we return briefly to the second factor mentioned above as distinguishing the instant case from *Nixon v. Warner Communications, Inc.* and *Belo Broadcasting Corp. v. Clark*. The fact that the defendant here has affirmatively requested television coverage and waived any objection thereto does eliminate one of the most important factors justifying a ban on electronic media news gathering. However, as discussed below, there are other interests supporting the rule which must be weighed against the countervailing interests pursuant to the appropriate level of scrutiny.

We derive from recent Supreme Court cases the appropriate level of scrutiny for a "time, place, and manner" regulation that restricts access in the courtroom. Such a restriction is constitutional if it is reasonable,⁹ if it promotes "significant governmental interests,"¹⁰ and if the restriction does not "unwarrantedly abridge . . . the opportunities for the communication of thought."¹¹

9. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 600 (Stewart, J., concurring in judgment) ("Just as a legislature may impose *reasonable* time, place, and manner restrictions upon the exercise of First Amendment freedoms, so may a trial judge impose *reasonable* limitations upon the unrestricted occupation of a courtroom by representatives of the press and members of the public.") (emphasis added).

10. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63 n.18 (1976) ("Reasonable regulations of the time, place, and manner of protected speech, where those regulations are necessary to further *significant governmental interests*, are permitted by the First Amendment.") (emphasis added).

11. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 581, n.18 (citing *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941)) ("Just as a government may impose reasonable time, place, and manner restrictions upon the use of its streets in the interest of such objectives as the free flow of traffic . . . so may a trial judge in the interest of the fair administration of justice, impose reasonable limitations on access to a trial. '[T]he question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge . . . the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places.'").

Having defined the appropriate level of scrutiny, we turn next to a discussion of the competing interests which must be weighed. Addressing first the interests which tend to support the media ban, we note that the highly significant interests of a defendant in obtaining a fundamentally fair trial are eliminated from our consideration in this case because defendant Hastings has expressly waived all such objections. However, at least two other institutional interests support the ban. First, courts have an interest in preserving order and decorum in the courtroom. *Illinois v. Allen*, 397 U.S. 337, 343 (1970). Second, there is an institutional interest in procedures which tend to insure a fair trial.¹² Stated another way, there is an institutional interest in procedures designed to increase the accuracy of the essential truth-seeking function of the trial. In *Estes v. Texas*, 381 U.S. 532, 544-51 (1965), the Supreme Court wrote at length about television's probable adverse impact on jurors, witnesses, and other trial participants, thus impairing the truth-finding function.¹³ While the Court in *Chandler v. Florida*, 449 U.S. at 575-78, acknowledged that technological improvements and the safeguards embodied in Florida's experiment may have muted some of the effects enumerated by the *Estes* court, nevertheless the *Chandler* court concluded that the effect of

12. Cf. *Gannett Co. v. DePasquale*, 443 U.S. 368, 398 (1979) (Powell, J., concurring) (The government, as well as the defendant, has an interest in obtaining "just convictions.").

13. Appellants argue that the district court accepted as true their proffer that the media coverage in the instant case would be unobtrusive. Thus they argue that we are presented with a unique case in which there is absolutely no legitimate interest favoring the media ban. Appellants' argument is without merit. The district court decided that it was bound by Rule 53 and Local Rule 20 and thus that an individualized consideration of the facts in this case—i.e., whether or not the media coverage would be obtrusive—was therefore inappropriate. Thus, there is no merit in appellants' suggestion that the institutional interests discussed in the text are not present in this case.

television coverage on trial participants is "still a subject of sharp debate." *Id.* at 578.

Turning now to the interests which tend to favor permitting the media coverage, three First Amendment concerns have been articulated by recent Supreme Court cases. First, the right of access to criminal trials fosters public confidence in the fairness of the criminal justice system. *Globe Newspaper Co. v. Superior Court*, 73 L.Ed.2d at 257. *Gannett Co. v. DePasquale*, 443 U.S. 368, 382 (1979). Second, the right of access allows the public to operate as a check on potential abuses in the judicial system. *Globe Newspaper Co. v. Superior Court*, 73 L.Ed.2d at 257. Finally, the right of access promotes the truth-finding function of the trial. *Id.*; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 569 (plurality opinion). In our judgment, the foregoing First Amendment concerns would be furthered by the media access sought here only to a minimal degree, if at all. The key factor affecting public confidence is the fact that trials are open and subject to public scrutiny, i.e., that trials are not secret. We can foresee no additional measure of confidence which might emanate merely from the different manner of media access, e.g., excerpts of live witnesses on the television screen, as opposed to an artist's sketch. See *United States v. CBS, Inc.*, 497 F.2d 102, 106 (5th Cir. 1974). Similarly, we do not conceive that the requested manner of access would enhance either the function of public trials as a check on judicial abuses, or the truth-finding role. To the contrary, the Supreme Court has indicated that the central truth-seeking function of the criminal trial could be adversely affected by television coverage, with its adverse impact on jurors, witnesses, and other trial participants. *Estes v. Texas*, 381 U.S. at 544-50; *Chandler v. Florida*, 449 U.S. at 575-78.

Weighing the countervailing interests in favor of and opposed to the media ban embodied in Rule 53 and Local Rule 20, we find that the media access sought here would advance First Amendment concerns only to a minimal degree, if at all. On the other hand, we find significant institutional interests supporting the rules at issue here. Furthermore, several reasons lead us to conclude that the per se approach of the current rule is reasonable. It is apparent from the above discussion that the interests relied upon are institutional interests which will exist generally. Also, the Supreme Court has noted that the impact of television coverage on jurors, witnesses, and other trial participants is "so subtle as to defy detection," *Estes v. Texas*, 381 U.S. at 545. Promulgation of the current rules in a legislative-type manner is more appropriate than a case-by-case approach in light of the difficulty of detecting the adverse impact of media coverage, and in view of the minimal or nonexistent infringement on First Amendment concerns. Finally, judicial efficiency and economy are served by a per se rule.

For the foregoing reasons, we find that *Nixon Communications, Inc.*, *supra*, and *Belo Broadcasting Corp. v. Clark*, *supra*,¹⁴ provide the controlling authority for this case, and we reject appellants' First Amendment challenge to Rule 53 and Local Rule 20. The matter is not one

14. The preceding discussion also makes clear that the recent developments in First Amendment law leave intact the Fifth Circuit's ruling in *Seymour v. United States*, 373 F.2d 629 (5th Cir. 1967). In that case, a television news photographer had taken television photographs of a criminal defendant and his attorney in the hallway outside the courtroom where the defendant had been arraigned. The photographer was found guilty of criminal contempt for violating the district court's standing order which prohibited photographing, televising, and broadcasting "in connection with any judicial proceeding on or from the same floor of the building on which the courtrooms are located." 373 F.2d at 630. The Fifth Circuit affirmed, and in so doing upheld the standing order against the First Amendment challenge. 373 F.2d at 631-33.

that should be fixed in constitutional concrete; rather, the issue is one that should be addressed to the appropriate rule-making authority.

II. SIXTH AMENDMENT

In his amicus brief, defendant Hastings argues that his Sixth Amendment right to a public trial entitles him to have this trial televised, to the extent that is technologically feasible.¹⁵ Without television coverage, Hastings argues, public understanding of his trial will be incomplete. In Hastings' view, television is necessary to rehabilitate his reputation so that he can return to the bench as an effective judge. This argument has been addressed and rejected elsewhere:

Nor does the Sixth Amendment require that the trial—or any part of it—be broadcast live or on tape to the public. The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed.

Nixon v. Warner Communications, Inc., 435 U.S. at 610. Following *Warner Communications, Inc.*, we reject the Sixth Amendment challenge to Rule 53 and Local Rule 20.¹⁶

AFFIRMED.

15. Appellants also mention the Sixth Amendment claim. Appellants' Brief at 14. As in *Nixon v. Warner Communications, Inc.*, *supra*, we assume arguendo that appellants have standing to assert defendant Hastings' Sixth Amendment right.

16. We note appellants' argument that the ban on use of audiovisual equipment arbitrarily discriminates against radio and television reporters. We disagree. While the ban on televising affects television reporters, the rules also prohibit tape recording and still photography, thus affecting radio broadcasters and newspaper reporters as well. See *Garrett v. Estelle*, 556 F.2d 1274, 1279 (5th Cir. 1977).

We have also considered appellants' other contentions, and find them without merit.

APPENDIX B

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CRIM. NO. 81-596-CR-ETG

UNITED STATES OF AMERICA

v.

ALCEE L. HASTINGS

**TRANSCRIPT OF PROCEEDINGS RELATING TO
HEARING ON DEFENDANT HASTINGS' MOTION
TO ALLOW BROADCASTING AND TELEVISIONING OF
TRIAL, ETC.**

Pursuant to notice, hearing was had in the above-entitled matter before Honorable Edward T. Gignoux, Chief Judge, United States District Court, District of Maine, sitting by designation as a United States District Judge in the United States District Court, Southern District of Florida, in the Main Courtroom, United States Courthouse, Miami, Florida, on Tuesday, November 30, 1982, at which time and place the following transpired.

APPEARANCES:

For the Government:

Reid H. Weingarten, Esq., Washington, D.C.

Robert I. Richter, Esq., Washington, D.C.

Jo Ann Farrington, Esq., Washington, D.C.

For Defendant Hastings:

Andrew P. Mavrides, Esq., Ft. Lauderdale, FL.
Patricia Williams, Esq., Ft. Lauderdale, FL.
William Waterman, Esq., Pontiac, Mich.
(Defendant Hastings was also personally present.)

For the Intervenors:

Talbot D'Alemberte, Esq., Miami, FL.
Richard Ovelmen, Esq., Miami, FL.
Alan Rosenthal, Esq., Miami, FL.

**BENCH RULING OF THE COURT WITH RESPECT
TO DEFENDANT HASTINGS' MOTION TO ALLOW
BROADCASTING AND TELEVISIONING
OF TRIAL, ETC.**

THE COURT: Well, counsel, the Court feels that it has heard all that needs to be said on these motions. The Court's ruling will be quite brief.

There are two motions before the Court at the present time. The first is the defendant Hastings' motion to allow broadcasting and televising of trial proceedings in this case via electronic media. The second motion is the application of the intervening news media to allow the telecasting, broadcasting, recording and photographing of the impending trial proceedings. In support of these motions, the defendant has recourse to his Sixth Amendment right to a public trial. The news media assert their First Amendment right of access to criminal trials. In support of both motions, the moving parties point to the allegedly unobtrusive state of the current art of radio and television broadcasting of a judicial proceeding, a representation based on the experience of the Florida state courts and other material in

the record, which the Court has indicated it will accept for the purposes of the present motions.

Despite the submissions of counsel, the Court has concluded that these two motions must be denied.

This Court is faced with not simply one but four unyielding obstacles to the granting of these motions. *First*, Rule 53 of the Federal Rules of Criminal Procedure, promulgated pursuant to 18 U.S.C. §3771, specifically prohibits the photographing or broadcasting of a judicial proceeding. *Second*, Rule 20 of the General Rules of the United States District Court for the Southern District of Florida, adopted pursuant to 28 U.S.C. §2071, prohibits all forms of broadcasting or televising equipment within the environs of a courthouse, including courtrooms, whether the Court is in session or in recess. *Third*, Resolution G, as amended, adopted in March, 1979, by the Judicial Conference of the United States, provides as follows—and I will read the Resolution in full because it has not been included in any of the submissions:

RESOLVED, That the Judicial Conference of the United States condemns the taking of photographs in the courtroom or its environs in connection with any judicial proceedings, and the broadcasting of judicial proceedings by radio, television, or other means, and considers such practices to be inconsistent with fair judicial procedure and that they ought not to be permitted in any federal court. A Judge may, however, permit the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings.

Fourth, Canon 3A(7) of the Code of Judicial Conduct for United States Judges adopted by the Judicial Conference of the United States specifically mandates that “[a] judge

should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions," except that a judge may authorize the use of such equipment for the presentation of evidence, for the perpetuation of a record and for the broadcasting of investitive, ceremonial or naturalization proceedings.

Rule 53 of the Federal Rules of Criminal Procedure clearly and in unambiguous terms precludes this Court from granting these motions. Rule 1 of the Federal Rules of Criminal Procedure provides that "[t]hese rules govern the procedure in all criminal proceedings in the courts of the United States . . ." The movants are not asking that Rule 53 be interpreted or construed, but simply that the Court set that Rule aside. The Court is without power to do so. As the Fifth Circuit observed in *Dupoint v. United States*, 388 F.2d 39, 44 (5th Cir. 1967): "The Federal Rules of Criminal Procedure have the force and effect of law. Just as a statute, the requirements promulgated in these Rules must be obeyed."

Just as the moving parties have presented no authority for their contention that this Court has the power to simply ignore Rule 53 of the Federal Rules of Criminal Procedure, they have presented no authority for the suggestion that this Court can disregard the explicit prohibition of radio or television broadcasting of judicial proceedings, not only by Local Rule 20 of this Court, but more importantly by amended Resolution G of the Judicial Conference of the United States and by Canon 3A(7) of the Code of Judicial Conduct for United States Judges, a code of conduct which is binding upon me as a federal district judge.

Relying principally upon *Gannett Newspaper Co. v. DePasquale*, 443 U.S. 368 (1978); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Globe Newspaper Co.*

v. Superior Court, U.S., 102 S. Ct. 2613 (1982); and *Chandler v. Florida*, 449 U.S. 560 (1981), movants contend that Rule 53, and presumably the cited Local Rule, Judicial Conference Resolution and Canon of Conduct, are unconstitutional. But *Gannett* held no more than that a criminal trial may not be closed to the public or the press without violating the defendant's Sixth Amendment right to a public trial. *Richmond Newspapers and Globe Newspaper Co.* held only that a criminal trial may not be closed to the public or the press without violating their First Amendment right of access to criminal trials, absent an overriding interest articulated in findings. And *Chandler* merely held that it was not a denial of the defendant's right to due process to permit the broadcasting of a trial over his objection. Separately, or in conjunction, these cases are inapposite to the argument made by the moving parties in this case. It is a far leap from those holdings to the holding sought here that the Constitution guarantees a criminal defendant and the news media the affirmative right to an electronically broadcast trial. As government counsel has pointed out in their brief, no court has ever held, or even suggested, that there is a constitutional right to have a criminal trial broadcast.

In sum, the movants have made no showing that the Constitution, or any statutory or case law by which the Court is bound, entitles this Court to disregard Rule 53 of the Federal Rules of Criminal Procedure, Local Rule 20 of the District Court for the Southern District of Florida, Judicial Conference Amended Resolution G, or Canon 3A(7) of the Code of Judicial Conduct for United States Judges. The defendant's Sixth Amendment right to a public trial is fully satisfied by a trial which is open to the public and the press. The First Amendment right of the news media are fully satisfied by their ability to

be present and to report what may transpire at a criminal trial.

An additional comment is appropriate. The arguments which have been so persuasively and ably presented by counsel today are addressed in this instance to the wrong forum. They should be made to the legislative bodies which enacted the rules, resolution and ethical canon here challenged. Some 26 States have granted the news media the type of access they seek. In my own State of Maine, limited access has recently been provided to the media. The Court has no doubt the day will come when those responsible for the various enactments which are binding upon this Court will be persuaded that under controlled circumstances, the televising and radio broadcasting of judicial proceedings may be permitted. But the mandate of Criminal Rule 53, Local Rule 20, Judicial Conference Resolution G, and Canon 3A(7) is explicit. It is binding on this Court and simply cannot be ignored.

The motion of the defendant Hastings to allow broadcasting and televising of his trial is denied. The application of the intervening news media to telecast, broadcast, record and photograph the impending trial proceedings in this case is denied. The Court will endorse its action on the original motion and application. (Pause.) The Court has endorsed the defendant's motion to allow broadcasting and televising of trial by unobtrusive electronic media with the date: "Hearing had. Motion denied. Edward T. Gignoux, U.S.D.J., by designation," and the Court has endorsed the application of the news media to allow telecasting, broadcasting, recording and photographing of the trial with the date: "Hearing had. Application denied. Edward T. Gignoux, U.S.D.J., by designation."

May the Court say this has been a most interesting argument. The Court appreciates the sincerity with which these arguments have been presented, and the Court will anticipate with great interest the views which may be expressed by the Eleventh Circuit, and possibly even by the Supreme Court, between now and January 10th.

(Whereupon, these proceedings were concluded.)

CERTIFICATE

I hereby certify that the foregoing is a true and complete transcript of the proceedings above-described, however, that Judge Gignoux has edited so much of this transcript as contains his bench ruling prior to release.

/s/ (Illegible)

Official Court Reporter

APPENDIX C

U.S. CONSTITUTION AMENDMENT I

7. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

APPENDIX D

RULE 53

FEDERAL RULES OF CRIMINAL PROCEDURE

The taking of photographs in the courtroom during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the courtroom shall not be permitted by the court.

APPENDIX E

GENERAL RULE 20

**LOCAL RULES OF THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT
OF FLORIDA**

Other than required by authorized personnel in the discharge of duties, all forms of equipment or means of photographing, tape-recording, broadcasting or televising within the environs of any place of holding court in the District, including courtrooms, chambers, adjacent rooms, hallways, doorways, stairways, elevators or offices of supporting personnel whether the Court is in session or at recess, is prohibited; provided that photographing in connection with naturalization hearings or other special proceedings, when approved by a Judge of this Court, will be permitted.

APPENDIX F

CANON 3A(7)

**CODE OF JUDICIAL CONDUCT FOR
UNITED STATES JUDGES**

A judge should prohibit broadcasting, televising, recording or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of the court or recesses between sessions except that a judge may authorize:

(a) the use of electronic or photographic means for the presentation of evidence, or for the perpetuation of a record; and

(b) the broadcasting, televising, recording or photographing of investigative, ceremonial, or naturalization proceedings.

APPENDIX G

RESOLUTION G

**JUDICIAL CONFERENCE OF THE
UNITED STATES**

RESOLVED, that the Judicial Conference of the United States condemns the taking of photographs in the courtroom with any judicial proceedings by radio, television, or other means, and considers such practices to be inconsistent with fair judicial procedure and that they ought not to be permitted in any federal court. A Judge may, however, permit the broadcasting, televising, recording or photographing of investigative, ceremonial, or naturalization proceedings.

APPENDIX H**CANON 3A(7)****FLORIDA CODE OF JUDICIAL CONDUCT**

Subject at all times to the authority of the presiding judge to (i) consider the conduct of proceedings before the court, (ii) ensure decorum and prevent distractions, and (iii) ensure the fair administration of justice in the pending cause, electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state shall be allowed in accordance with standards and conduct and technology promulgated by the Supreme Court of Florida.

Standards of Conduct and Technology Governing Electronic Media and Still Coverage of Judicial Proceedings

1. *Equipment and personnel.*

(a) Not more than one portable television camera [film camera—16mm sound on film (self-blinded) or video tape electronic camera], operated by not more than one camera person, shall be permitted in any trial court proceeding. Not more than two television cameras, operated by not more than one camera person each, shall be permitted in any appellate court proceeding.

(b) Not more than one still photographer, utilizing not more than two still cameras with not more than two lenses for each camera and related equipment for print purposes shall be permitted in any proceeding in a trial or appellate court.

(c) Not more than one audio system for radio broadcast purposes shall be permitted in any proceeding

in a trial or appellate court. Audio pickup for all media purposes shall be accomplished from existing audio systems present in the court facility. If no technically suitable audio system exists in the court facility, microphones and related wiring essential for media purposes shall be unobtrusive and shall be located in places designated in advance of any proceeding by the chief judge of the judicial circuit or district in which the court facility is located.

(d) Any "pooling" arrangements among the media required by these limitations on equipment and personnel shall be the sole responsibility of the media without calling upon the presiding judge to mediate any dispute as to the appropriate media representative or equipment authorized to cover a proceeding. In the absence of advance media arrangement on disputed equipment or personnel issue, the presiding judge shall exclude all contesting media personnel from a proceeding.

2. *Sound and light criteria.*

(a) Only television photographic and audio equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. Specifically, such photographic and audio equipment shall produce no greater sound or light than the equipment designated in Schedule A annexed hereto, when the same is in good working order. No artificial lighting device of any kind shall be employed in connection with the television camera.

(b) Only still camera equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. Specifically, such still camera equipment shall produce no greater sound or light than a 35mm Leica "M" Series Rangefinder camera, and no artificial lighting device of any kind shall be employed in connection with a still camera.

(c) It shall be the affirmative duty of media personnel to demonstrate to the presiding judge adequately in advance of any proceeding that the equipment sought to be utilized meets the sound and light criteria enunciated herein. A failure to obtain advance judicial approval for equipment shall preclude its use in any proceeding.

3. *Location of Equipment personnel.*

(a) Television camera equipment shall be positioned in such a location in the court facility as shall be designated by the chief judge of the judicial circuit or district in which such facility is situated. The area designated shall provide reasonable access to coverage. If and when areas remote from the court facility which permit reasonable access to coverage are provided all television camera and audio equipment shall be positioned only in such area. Video tape recording equipment which is not a component part of a television camera shall be located in an area remote from the court facility.

(b) A still camera photographer shall position himself or herself in such location in the court facility as shall be designated by the chief judge of the judicial circuit or district in which such facility is situated. The area designated shall provide reasonable access to coverage. Still camera photographers shall assume a fixed position within the designated area and, once a photographer has established himself or herself in a shooting position, he or she shall act so as not to call attention to himself or herself through further movement. Still camera photographers shall not be permitted to move about in order to obtain photographs of the proceedings.

(c) Broadcast media representatives shall not move about the court facility while proceedings are in session, and microphones or taping equipment once posi-

tioned as required by 1.(c) above shall not be moved during the pendency of the proceeding.

4. *Movement during the proceedings.* News media photographic or audio equipment shall not be placed in or removed from the court facility except prior to commencement or after adjournment of proceedings each day, or during a recess. Neither television film magazines nor still camera film or lenses shall be changed within a court facility except during a recess in the proceeding.

5. *Courtroom light sources.* With the concurrence of the chief judge of a judicial circuit or district in which a court facility is situated, modifications and additions may be made in light sources existing in the facility, provided such modifications or additions are installed and maintained without public expense.

6. *Conferences of counsel.* To protect the attorney-client privilege and the effective right to counsel, there shall be no audio pickup or broadcast of conferences which occur in a court facility between attorneys and their clients, between co-counsel of a client, or between counsel and the presiding judge held at the bench.

7. *Impermissible use of media material.* None of the film, video tape still photographs or audio reproductions developed during or by virtue of coverage of a judicial proceeding shall be admissible as evidence in the proceeding out of which it arose, any proceeding subsequent to collateral thereto, or upon a retrial or appeal of such proceeding.

8. *Appellate review.* Review of an order excluding the electronic media from access to any proceeding, excluding coverage of a particular participant or upon any other matters arising under these standards shall be pursuant to Florida Rule of Appellate Procedure 9.100(d).

A30

Schedule A

FILM CAMERAS16mm Sound on Film (self blimped)

1.	Cinema Products	CP-16A-R	Sound Camera
2.	Arriflex	16mm-16BL Model	Sound Camera
3.	Frezzolini	16mm (LW16)	Sound on Film Camera
4.	Auricon	"Cini Voice"	Sound Camera
5.	Auricon	"Pro-600"	Sound Camera
6.	General Camera	SS III	Sound Camera
7.	Eclair	Model ACL	Sound Camera
8.	General Camera	DGX	Sound Camera
9.	Wilcam Reflex	16mm	Sound Camera

VIDEO TAPE ELECTRONIC CAMERAS

1.	Ikegami	HL-77 HL-33 HL-35 HL-34 HL-51
2.	RCA	TK76
3.	Sony	DXC-1600 Trinicon
3a.	ASACA	ACC-2006
4.	Hitachi	SK 80, SK 90
5.	Hitachi	FP-3030
6.	Phillips	LDK-25
7.	Sony BVP-200	ENG Camera
8.	Fernseh	Video Camera
9.	JVC-8800 u	ENG Camera
10.	AKAI	CVC-150 VTS-150
11.	Panasonic	WV-3085 NV-3085
12.	JVC	GC-4800u

VIDEO TAPE RECORDERS/used with video cameras

1.	Ikegama	3800
2.	Sony	3800
3.	Sony	BVC-100
4.	Ampex	Video Recorder
5.	Panasonic	1 inch Video Recorder
6.	JVC	4400
7.	Sony	3800H